

CUSTOMARY MARINE TENURE AS ENVIRONMENTAL LAW: REIMAGINING OCEAN JUSTICE

Happy Okundaye Oji, LL.M.

*Legal Practitioner and Researcher in Environmental Law, Climate Justice, Indigenous Ocean
Governance and Customary Marine Tenure*

Okundaye Law Firm

Benin City, Edo State, Nigeria

oji.happy@iuokada.edu.ng

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ABSTRACT

Contemporary ocean governance remains predominantly state-centred despite increasing recognition that effective environmental protection requires legal frameworks capable of accommodating diverse normative traditions. Although customary marine tenure has received considerable scholarly attention within Indigenous rights, legal pluralism and community-based resource management, its status as environmental law has attracted comparatively little doctrinal analysis. This article argues that customary marine tenure constitutes environmental law because it establishes binding rules governing access to marine resources, ecological stewardship, conservation, dispute resolution and intergenerational responsibility. Adopting a doctrinal legal research methodology, it examines international environmental law, legal pluralist jurisprudence and comparative jurisprudence to determine whether customary marine tenure possesses the defining characteristics of environmental law. The analysis demonstrates that those characteristics depend upon the regulatory functions performed by a legal system rather than the institutional source from which its rules originate. It further shows that recognising customary marine tenure as environmental law provides a stronger jurisprudential foundation for ocean justice by acknowledging Indigenous marine legal institutions as complementary components of environmental governance operating within constitutional and statutory frameworks. A functional and pluralist understanding of environmental law therefore more accurately reflects the diversity of legal institutions through which marine environments have historically been governed.

Keywords: Customary Marine Tenure; Ocean Justice; Environmental Law; Indigenous Ocean Governance; Legal Pluralism; Marine Environmental Governance.

Introduction

Ocean governance has become a central concern of contemporary environmental law as climate change, biodiversity loss, marine pollution and the overexploitation of marine resources continue to expose the limitations of predominantly state-centred systems of regulation. Although international environmental law has established an extensive framework for the conservation and sustainable use of marine ecosystems, persistent ecological decline demonstrates that treaties and statutory regulation alone have not secured effective or equitable governance of the world's oceans (Intergovernmental Panel on Climate Change [IPCC], 2022; United Nations, 1982, 2023). This gap between legal frameworks and environmental outcomes has stimulated growing scholarly interest in ocean justice, which extends beyond environmental protection to examine the legitimacy, fairness and distribution of legal authority in ocean governance (Bosselmann, 2017; Morgera, 2018).

Despite these developments, environmental law remains largely influenced by legal centralism, under which constitutions, legislation, treaties and judicial decisions are regarded as the principal sources of legal authority. Although Indigenous peoples are increasingly recognised as participants in ocean governance and custodians of valuable ecological knowledge, their legal institutions are seldom acknowledged as autonomous sources of environmental law (Convention on Biological Diversity, 1992; United Nations, 2007). Consequently, legal scholarship has devoted far greater attention to Indigenous participation in environmental decision-making than to the juridical status of Indigenous systems of marine governance.

This omission is particularly evident in relation to customary marine tenure. Across many coastal communities, customary marine tenure establishes recognised rules governing access to marine resources, ecological stewardship, conservation, dispute resolution and community responsibility. These rules regulate relationships between communities and marine ecosystems through established normative institutions and recognised enforcement mechanisms. Nevertheless, customary marine tenure continues to be examined principally as a cultural institution, a form of traditional ecological knowledge or a community-based resource management system rather than as environmental law in its own right (Berkes, 2018; Ostrom, 1990; Tamanaha, 2001).

This article advances the doctrinal proposition that customary marine tenure constitutes environmental law because it performs the core regulatory functions traditionally associated with environmental governance, including the allocation of rights and responsibilities, the regulation of access to natural resources, ecological protection, dispute resolution and the promotion of sustainable resource use. The defining characteristics of environmental law depend not on the institutional origin of legal rules but on the regulatory functions they perform. The central question is therefore whether customary marine tenure satisfies those defining characteristics notwithstanding its non-state origin.

Using a doctrinal legal research methodology, this article analyses international environmental law, legal pluralist jurisprudence, comparative judicial authority and leading environmental law scholarship to determine whether customary marine tenure satisfies the defining characteristics of environmental law. It develops a doctrinal framework for recognising Indigenous marine legal orders as components of contemporary environmental law and demonstrates that such recognition strengthens ocean justice without displacing state regulatory authority.

The article proceeds in four parts. Section Two examines the limitations of state-centred environmental law as a framework for achieving ocean justice. Section Three evaluates whether customary marine tenure satisfies the defining characteristics of environmental law. Section Four

considers the jurisprudential implications of recognising customary marine tenure for legal pluralism and contemporary ocean governance. The Conclusion identifies the principal doctrinal implications of the analysis and considers their significance for the future development of environmental law and ocean justice.

Ocean Justice and the Limits of State-Centred Environmental Law

Ocean justice has emerged as an important dimension of contemporary environmental law, reflecting increasing recognition that effective ocean governance depends not only on ecological protection but also on the legitimacy and fairness of the legal institutions through which marine resources are governed. Whereas the traditional law of the sea focused principally on maritime boundaries, navigation and resource exploitation, contemporary environmental law increasingly seeks to reconcile ecological sustainability with equitable governance, intergenerational responsibility and meaningful participation in the management of marine ecosystems (Bosselmann, 2017; Morgera, 2018). Ocean justice therefore concerns not only the protection of marine environments but also the distribution of legal authority over their governance.

Despite these developments, the international legal order governing the oceans remains predominantly state-centred. The United Nations Convention on the Law of the Sea (UNCLOS) provides the principal legal framework by allocating jurisdiction over maritime zones and imposing obligations on States to protect and preserve the marine environment (United Nations, 1982). Articles 192 and 194 require States to adopt measures to prevent, reduce and control marine pollution while safeguarding marine ecosystems. Although these provisions impose positive environmental obligations upon States, they provide no comprehensive mechanism through which Indigenous legal systems governing marine resources may be recognised as autonomous sources of environmental law.

Subsequent international instruments have expanded the role of Indigenous peoples without fundamentally altering this model. Article 8(j) of the Convention on Biological Diversity (CBD) recognises the importance of Indigenous knowledge and practices relevant to biodiversity conservation and encourages their preservation and application with the approval and involvement of Indigenous communities (Convention on Biological Diversity, 1992). Similarly, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms the rights of Indigenous peoples to maintain their legal institutions, participate in decisions affecting their lands and resources, and preserve their traditional relationships with the environment (United Nations, 2007). More recently, the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement) recognises the value of scientific and traditional knowledge in advancing marine conservation (United Nations, 2023). Collectively, these instruments strengthen the protection of Indigenous interests but stop short of recognising Indigenous legal institutions as independent sources of environmental law.

The distinction between participation and legal authority is therefore fundamental. International law increasingly promotes consultation with Indigenous peoples and acknowledges the value of their ecological knowledge. Consultation alone, however, does not recognise the institutions through which Indigenous communities regulate access to natural resources, resolve disputes and enforce conservation obligations as sources of legal authority. Indigenous governance may therefore be incorporated into environmental decision-making while the normative systems on which it depends remain legally unrecognised. The prevailing framework consequently accommodates Indigenous participation more readily than Indigenous legal authority.

This limitation reflects the enduring influence of legal centralism, which regards the State as the exclusive source of legally valid norms. Legal pluralist scholarship has consistently challenged this assumption by demonstrating that multiple legal systems may coexist within the same social and territorial space, each possessing recognised institutions, normative rules and mechanisms of enforcement (Griffiths, 1986; Tamanaha, 2001). From this perspective, the legitimacy of a legal order depends not solely upon its institutional origin but upon its capacity to regulate conduct through recognised legal norms. This insight is particularly significant in environmental governance, where statutory regulation frequently operates alongside long-established Indigenous systems of resource management (Berkes, 2018; Ostrom, 1990; Oji, 2026). The limitations of an exclusively state-centred approach are further illustrated by continuing marine environmental decline despite the expansion of international and domestic regulation. Biodiversity loss, overfishing, habitat degradation, plastic pollution and the accelerating impacts of climate change persist notwithstanding increasingly sophisticated legal frameworks (Intergovernmental Panel on Climate Change [IPCC], 2022; Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services [IPBES], 2019). This continuing decline does not diminish the importance of statutory regulation. Rather, it demonstrates that durable environmental protection requires legal frameworks capable of accommodating complementary sources of environmental authority, provided they operate consistently with constitutional principles and international legal obligations.

The central jurisprudential question is therefore no longer whether Indigenous peoples should participate in ocean governance, as contemporary international law increasingly answers that question in the affirmative. The more significant issue is whether Indigenous legal institutions regulating marine environments possess the defining characteristics of environmental law. Resolving that question requires an examination of the legal structure, regulatory functions and normative foundations of customary marine tenure. Section Three undertakes that analysis.

Customary Marine Tenure as Environmental Law

Whether customary marine tenure constitutes environmental law cannot be determined solely by reference to its Indigenous origin. The appropriate inquiry is doctrinal: whether it possesses the legal characteristics traditionally associated with environmental law. Environmental law is generally understood as the body of legal rules regulating the relationship between human activities and the natural environment through the allocation of rights and responsibilities, the regulation of resource use, the protection of ecological systems, and the establishment of mechanisms for enforcement and dispute resolution (Birnie et al., 2009; Sands et al., 2018). Although these functions are commonly performed through legislation and international treaties, neither their legal purpose nor their normative character depends exclusively upon statutory enactment.

This functional understanding is consistent with legal pluralist jurisprudence, which rejects the assumption that the State is the sole source of legally valid norms. Griffiths (1986) argues that multiple legal orders may coexist within the same social and territorial space, each possessing recognised institutions, normative rules and mechanisms of enforcement. Similarly, Tamanaha (2001) maintains that the existence of law depends upon its recognition and operation within a community rather than exclusively upon formal state adoption. These perspectives are particularly relevant to environmental governance, where Indigenous communities have long regulated the use and conservation of natural resources through established legal institutions operating alongside statutory law. Viewed from this perspective, the legal character of customary marine tenure depends not upon its historical origin but upon the functions it performs. Across

many Indigenous coastal communities, customary marine tenure regulates access to marine spaces, allocates harvesting rights, imposes obligations of stewardship, protects ecologically significant areas, resolves disputes and prescribes consequences for breaches of customary rules. These are not merely social practices or cultural expectations. They constitute normative rules administered through recognised community institutions and accepted as binding by those subject to them. Their primary purpose is to regulate the relationship between human communities and the marine environment in a manner that promotes ecological sustainability and social order. Measured against the defining characteristics of environmental law, customary marine tenure exhibits its essential legal features. First, it regulates access to marine resources through recognised rights and obligations rather than unrestricted communal use. Rights to fish, harvest shellfish or utilise particular reefs, lagoons and coastal waters are determined by established customary rules identifying who may access those resources, under what conditions and for what purposes. These rules define both entitlement and limitation, thereby performing the same regulatory function as statutory fisheries legislation by controlling resource use and reducing competing claims that threaten sustainable management (Berkes, 2018; Ostrom, 1990).

Secondly, customary marine tenure imposes legally recognised obligations of environmental stewardship. Rights over marine areas are ordinarily accompanied by corresponding duties to conserve ecological resources and avoid practices that threaten their long-term sustainability. Stewardship is therefore not merely an ethical expectation but a legal obligation embedded within the customary institutions responsible for governing marine resources. In this respect, customary marine tenure reflects one of the central objectives of contemporary environmental law: the conservation of ecosystems through regulated rather than unrestricted resource use (Bosselmann, 2017).

Thirdly, customary marine tenure incorporates institutional mechanisms for implementing and enforcing environmental obligations. Rules governing marine resources are interpreted and applied through recognised customary authorities responsible for supervising resource use, resolving disputes and responding to breaches of community obligations. The existence of recognised decision-makers and accepted procedures distinguishes customary marine tenure from informal social practice. As Hart (2012) explains, a legal system is characterised not only by primary rules regulating conduct but also by secondary rules identifying authority and providing procedures through which legal norms are recognised and applied. Although Indigenous legal institutions differ from state courts in their structure and operation, they nevertheless perform equivalent legal functions within their respective communities.

Accordingly, the defining characteristics of environmental law are determined by the regulatory functions a legal system performs rather than the institutional source from which its rules originate. Customary marine tenure regulates human interaction with the marine environment through recognised legal norms, enforceable obligations and established institutions. The remaining question is whether judicial authority supports the recognition of those institutions as components of environmental law.

Judicial authority reinforces this functional understanding of customary marine tenure. In *Commonwealth v Yarmirr* (2001), the High Court of Australia recognised that rights and interests arising under traditional laws and customs could survive the assertion of Crown sovereignty where they had not been validly extinguished. Although the case concerned the recognition of native title rather than environmental regulation, it established that Indigenous legal systems are capable of generating legally cognisable rights in relation to marine areas. The significance of *Yarmirr*

therefore lies not merely in recognising marine rights but in affirming that Indigenous legal orders may continue to regulate relationships with marine spaces within a modern legal system.

This approach was further developed in *Akiba v Commonwealth* (2013), where the High Court held that native title rights to access and use marine resources could extend to commercial exploitation where supported by traditional laws and customs. The decision is significant because it confirmed that the legal content of Indigenous marine rights derives from the normative rules of the relevant Indigenous legal system rather than from statutory creation. Although decided within the framework of native title law, *Akiba* demonstrates that Indigenous legal institutions are capable of creating legally enforceable rights and obligations concerning marine resources. The case therefore supports the proposition that customary marine tenure operates as a legal system regulating environmental relationships rather than as a collection of cultural practices devoid of legal significance.

Comparative jurisprudence likewise demonstrates that recognising Indigenous legal institutions does not undermine State sovereignty. In *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643, the New Zealand Court of Appeal rejected the assumption that Crown sovereignty had automatically extinguished Māori customary rights to the foreshore and seabed. The Court held that customary property rights continued unless lawfully extinguished by clear legislative authority. Although the decision concerned customary title rather than environmental regulation, it affirmed the broader principle that Indigenous legal rights are not displaced merely because the State exercises sovereignty. State authority and the continued operation of Indigenous legal institutions are therefore capable of coexistence within a single constitutional order.

A similar principle was recognised much earlier in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, where the Privy Council held that Indigenous customary law constituted a legitimate source of legal rights capable of judicial recognition. Rejecting the automatic application of English concepts of ownership, the Board emphasised that customary rights must be understood according to the legal traditions from which they arise. Although the case concerned customary land tenure, its reasoning is equally instructive for customary marine tenure because it recognises the juridical character of Indigenous legal systems independently of statutory recognition.

Taken together, these decisions demonstrate that Indigenous legal institutions are capable of generating legally recognised rights and obligations relating to marine resources. They also undermine the assumption that legal validity depends exclusively upon statutory origin. Once customary marine tenure is assessed according to its regulatory functions rather than its institutional source, there is no principled basis for excluding it from environmental law solely because it originates within Indigenous legal systems.

This conclusion does not imply that customary marine tenure operates independently of constitutional or statutory frameworks, nor that every customary rule is automatically enforceable within the modern State. Rather, it supports a pluralist conception of environmental law in which Indigenous legal institutions may complement statutory regulation, provided they operate consistently with constitutional requirements, applicable legislation and internationally recognised human rights standards. Within those limits, customary marine tenure performs the same regulatory functions that environmental law seeks to achieve through statutory conservation regimes, namely the regulation of resource use, ecological stewardship, dispute resolution and the protection of marine ecosystems.

Accordingly, the exclusion of customary marine tenure from mainstream environmental jurisprudence reflects the continuing influence of legal centralism rather than any deficiency in its

legal character. Recognising customary marine tenure as environmental law therefore represents a functional application of established legal principles rather than an expansion of environmental law beyond its legitimate boundaries. The implications of that conclusion for ocean justice are examined in the next section.

Reimagining Ocean Justice Through the Recognition of Customary Marine Tenure

If customary marine tenure possesses the defining characteristics of environmental law, its continued exclusion from mainstream environmental jurisprudence cannot be justified solely because it originates outside the institutions of the modern State. The issue therefore shifts from classification to legal recognition and the implications of that recognition for ocean justice. Contemporary approaches have strengthened environmental regulation, expanded public participation and improved the implementation of international environmental obligations. Nevertheless, they continue to assume that environmental law derives principally from the State, leaving Indigenous legal institutions largely confined to an advisory or consultative role.

This limitation is jurisprudential rather than institutional. Consultation enables Indigenous peoples to contribute to environmental decision-making, but it does not recognise their legal institutions as sources of environmental regulation. A community may participate in decisions affecting marine resources while the customary rules governing those resources remain without legal effect. Ocean justice therefore requires more than procedural participation; it requires appropriate recognition of Indigenous legal authority where customary institutions regulate marine environments through established legal norms.

Legal pluralism provides the jurisprudential foundation for such recognition. It accepts that multiple legal orders may coexist within a single constitutional framework without undermining State sovereignty or legislative supremacy (Griffiths, 1986; Tamanaha, 2001). Recognition is therefore not a transfer of sovereign authority but an acknowledgement that Indigenous normative institutions may legitimately perform environmental regulatory functions alongside statutory law. Where customary rules are consistent with constitutional requirements, human rights standards and applicable legislation, they may complement statutory regulation by strengthening ecological stewardship, improving regulatory legitimacy and encouraging community compliance. Where inconsistency arises, constitutional supremacy and valid legislation prevail. Recognition therefore promotes coordination between legal systems rather than competition.

This approach also strengthens environmental governance. Indigenous regulatory institutions are embedded within the communities most directly affected by environmental change and often possess detailed knowledge of local ecosystems, seasonal cycles and sustainable harvesting practices acquired through generations of interaction with the marine environment. Their contribution lies not merely in traditional ecological knowledge but in the existence of established legal institutions capable of regulating resource use, enforcing community obligations and promoting long-term ecological stewardship. Integrating such institutions with statutory environmental regulation therefore enhances both the legitimacy and effectiveness of marine governance.

Developments in international environmental law increasingly support this direction. The Convention on Biological Diversity, the United Nations Declaration on the Rights of Indigenous Peoples and the BBNJ Agreement each recognise the importance of Indigenous participation, institutions and knowledge in environmental governance (Convention on Biological Diversity, 1992; United Nations, 2007, 2023). Although these instruments do not expressly recognise Indigenous legal systems as autonomous sources of environmental law, they demonstrate an

emerging acceptance that effective environmental governance requires engagement with Indigenous legal traditions. Recognising customary marine tenure as environmental law is therefore a logical extension of this evolving jurisprudence rather than a departure from it.

Accordingly, ocean justice requires a broader understanding of the sources of environmental law. Restricting environmental regulation to norms created exclusively by the State overlooks legally organised systems of ecological governance that have regulated marine environments over generations. Recognising customary marine tenure as environmental law neither diminishes State sovereignty nor creates competing legal orders. Rather, it reflects a more accurate understanding of the plurality of legal institutions through which environmental governance has historically been achieved. Ocean justice is therefore strengthened not by replacing State law, but by recognising Indigenous marine legal orders as complementary components of a coherent environmental legal framework capable of promoting environmentally sustainable, legally legitimate and socially inclusive marine governance.

Conclusion

The analysis demonstrates that the juridical status of customary marine tenure depends upon the regulatory functions it performs rather than its Indigenous origin. Examined doctrinally, it performs the functions traditionally associated with environmental law, including the regulation of marine resources, ecological stewardship, dispute resolution and the allocation of legal rights and responsibilities. Its continued exclusion from mainstream environmental jurisprudence therefore reflects the persistence of legal centralism rather than any deficiency in its normative or regulatory structure.

This conclusion is subject to limitations. The article has examined customary marine tenure as a matter of legal doctrine rather than undertaking a comparative evaluation of specific customary marine tenure systems or their operation within particular constitutional frameworks. Nor does it resolve every question concerning the interaction between customary marine tenure and statutory environmental regulation, particularly where constitutional or human rights considerations arise. These issues require further jurisdiction-specific and comparative research.

The doctrinal implications are nevertheless clear. Courts should evaluate customary marine tenure according to its legal structure and regulatory functions rather than dismissing it as merely cultural practice or traditional ecological knowledge. Legislatures should enact legal frameworks that recognise compatible customary marine institutions, clarify their relationship with statutory environmental regulation and establish clear procedures for resolving conflicts where they arise. Such recognition must remain subject to constitutional supremacy, applicable legislation and internationally recognised human rights standards.

Future research should examine how this framework operates across different constitutional systems in which customary and statutory environmental regulation coexist. Environmental law has continually evolved by recognising new principles, institutions and regulatory approaches in response to changing environmental realities. The recognition of customary marine tenure reflects that continuing evolution towards a more functionally inclusive understanding of legal authority. It neither enlarges environmental law beyond its legitimate boundaries nor diminishes the authority of the State. Rather, it acknowledges that environmental governance has long been sustained through multiple legal traditions operating within constitutional frameworks. Ocean justice cannot be fully realised while Indigenous marine legal institutions remain excluded from environmental jurisprudence solely because they originate outside the institutions of the modern State.

References

- Berkes, F. (2018). *Sacred ecology* (4th ed.). Routledge.
- Birnie, P., Boyle, A., & Redgwell, C. (2009). *International law and the environment* (3rd ed.). Oxford University Press.
- Bosselmann, K. (2017). *The principle of sustainability: Transforming law and governance* (2nd ed.). Routledge.
- Convention on Biological Diversity. (1992). *Convention on Biological Diversity*. <https://www.cbd.int/convention/text/>
- Griffiths, J. (1986). What is legal pluralism? *The Journal of Legal Pluralism and Unofficial Law*, 24(1), 1–55. <https://doi.org/10.1080/07329113.1986.10756387>
- Hart, H. L. A. (2012). *The concept of law* (3rd ed.). Oxford University Press.
- Intergovernmental Panel on Climate Change. (2022). *Climate change 2022: Impacts, adaptation and vulnerability*. Cambridge University Press. <https://www.ipcc.ch/report/ar6/wg2/>
- Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. (2019). *Global assessment report on biodiversity and ecosystem services*. IPBES Secretariat. <https://ipbes.net/global-assessment>
- Morgera, E. (2018). *Fair and equitable benefit-sharing in international law*. Oxford University Press.
- Oji, H. O. (2026). Customary marine tenure and the limits of state-centric ocean governance in Nigeria: A climate justice perspective. *GAS Journal of Arts, Humanities and Social Sciences*, 4(6), 20–50. <https://doi.org/10.5281/zenodo.20615493>
- Ostrom, E. (1990). *Governing the commons: The evolution of institutions for collective action*. Cambridge University Press.
- Sands, P., Peel, J., Fabra, A., & MacKenzie, R. (2018). *Principles of international environmental law* (4th ed.). Cambridge University Press.
- Tamanaha, B. Z. (2001). *A general jurisprudence of law and society*. Oxford University Press.
- United Nations. (1982). *United Nations Convention on the Law of the Sea*. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
- United Nations. (2007). *United Nations Declaration on the Rights of Indigenous Peoples* (A/RES/61/295). <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>
- United Nations. (2023). *Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*. <https://www.un.org/bbnjagreement/>